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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

**ELIAZAR HERRERA-VINEGAS,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## SUPPLEMENTAL APPENDIX

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## SUPPLEMENTAL APPENDIX

# SUPPLEMENTAL APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

Case No. DR-83-CA-34
(Criminal Action No. DR-77-CR-43)

UNITED STATES OF AMERICA,

*Plaintiff,*

*vs.*

ELIAZAR HERRERA-VINEGAS,

*Defendant.*

## UNITED STATES MAGISTRATE'S MEMORANDUM & RECOMMENDATION

The following findings and recommendations are submitted to the Court pursuant to Title 28, United States Code, § 636(b)(1)(B) and Rules 2(b)(1) and 3(a)(1) of the order of 1980 pertaining to the powers and duties of the United States Magistrate.

### *History of the Case*

Petitioner, Eliazar HERRERA-Vinegas, on August 21, 1983, filed his motion to Vacate, Set Aside or Correct Sentence by a person in Federal Custody. He was convicted in Cause No. DR-77-CR-43, United States of America v. Eliazar HERRERA-Vinegas, and sentenced to 45 years

in prison and fined $100,000.00. The case was appealed and the Fifth Circuit affirmed it in an unpublished opinion. Among those grounds raised upon appeal were the insufficiency of evidence to support his conviction. Thereafter, Petitioner filed a Motion to Vacate, Set Aside or Correct Sentence and other motions attacking the admission of hearsay testimony, admission of evidence obtained in an unlawful search, exposure to double jeopardy, insufficiency of evidence and ineffective assistance of counsel. The Court prepared a memorandum opinion overruling each of these points and filed it on January 25, 1982. A judgment of dismissal was filed with it. The record reflects that the Clerk mailed copies of the memorandum opinion and Judgment to Petitioner at his address in Kansas. No appeal was taken from this judgment.

Now, Petitioner has filed a subsequent Motion to Vacate, Set Aside or Correct Sentence in Cause No. DR-83-CR-34. Once again, he raises the issue of ineffective assistance of counsel and, the issue of lack of an interpreter and illegal sentence. This Court denied the petition because of abuse of the writ and petitioner appealed the order. The Fifth Circuit Court of Appeals reversed the order of this Court with the instructions that Petitioner had a right to present reasons why the alleged constitutional violations were not presented in his previous petitions.

An order was entered by this Court ordering Petitioner to show cause why this latest motion should not be dismissed under Rule 9(b) for abuse of the writ. Petitioner filed his response within the time period allowed.

*Findings of Fact and Conclusions of Law*

The response filed by Petitioner is without merit. Petitioner has not shown any reason why his repetitive claim of ineffective assistance of counsel deserves reconsideration. The issue of Petitioner's counsel was decided by this Court in an earlier proceeding and in doing so reviewed and relied upon files and records from Petitioner's case. Petitioner did not appeal that finding. Moreover, Peti-

tioner made no showing that the ends of Justice would be best served by reaching the merits of this subsequent petition.

Petitioner's explanation of his failure to raise the remaining grounds in his previous petition is also without merit.

He does not contend he was unaware of the facts supporting his newly asserted claims or that he was unaware that those facts constituted a basis for habeas relief. See *Jones v. Estelle*, 692 F2d 380, (5th Cir.) 1982. He contends that he has tried on previous occasions to bring them before the Court through his "jailhouse attorneys" but due to their lack of knowledge, inexperience and communication problems, it was not done. (See Tr.)

Petitioner was ordered by United States District Judge, D.W. Suttle in September 1980 to "put all his claims in one motion and that the Court Clerk supply Petitioner with a Section 2255 form petition." (Tr. 95) At least two amended motions were filed after the order of Judge Suttle in which he could have presented the above issues. Petitioner has not shown just cause for not doing so. See *Jones v. Estelle*, supra.

*Recommendation*

The Petitioner's motion to Vacate, Set Aside or Correct Sentence should be summarily dismissed without considering the merits of the allegations.

SIGNED AND ENTERED this 4th day of February, 1985.

DURWOOD EDWARDS
United States Magistrate

*Certificate of Service*

The Clerk shall serve a copy hereof upon all parties by mailing such copy to their attorneys of records, if any, and to the Petitioner. Any party may serve and file written objections to such findings and recommendations within ten (10) days after being served. See Title 28 United States Code § 636(b)(1)(C) and Rule 3(a)(1), local Rules, Powers and Duties of the United States Magistrate adopted by the Judges of the Western District of Texas.

_____

DURWOOD EDWARDS
United States Magistrate

# SUPPLEMENTAL APPENDIX II

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CIVIL ACTION NO. DR-83-CA-34
(Crim. Action No. DR-77-CR-43)

ELIAZAR VINAGAS-HERRERA,

*Plaintiff,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant.*

ORDER

The matter before the Court is Petitioner's Motion to Vacate, Set Aside or Correct Sentence and the United States Magistrate's findings and recommendation, filed on February 4, 1985, concerning this motion. No objections to the Magistrate's findings and recommendation have been filed with the district court, therefore, a de novo review by this Court has been rendered unnecessary. *See* 28 U.S.C. § 636(b)(1)(C).

Accordingly, the Court hereby approves and adopts the Magistrate's Findings and Recommendation and it is ORDERED that the Motion to Vacate, Set Aside or Correct Sentence be dismissed with prejudice for writ abuse.

SIGNED and ENTERED this 14th day of March, 1985.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

# SUPPLEMENTAL APPENDIX III

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CIVIL ACTION NO. DR-83-CA-34
(DR-77-CR-43)

ELIAZAR VINAGAS-HERRERA,

*Plaintiff,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant.*

O R D E R

Explanation and Instructions—Read Carefully.

I.

Rule 9. Delayed or successive motions.

(a) *Delayed motions.* A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) *Successive motions.* A second successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

II.

Your motion to vacate, set aside, or correct sentence has been found to be subject to dismissal under Rule 9(b) for the following reasons:

A review of the file indicates that you have previously filed an appeal and a 28 U.S.C. 2255 motion attacking your conviction in this case. In the appeal you raised the issues of insufficient evidence and denial of motions. This appeal was denied and the case affirmed by the Fifth Circuit on June 29, 1978. In your 2255 Motion you alleged illegally obtained evidence, entrapment, wrong venue, ineffective assistance of counsel, inadmissible evidence, illegal search and seizure and double jeopardy which was denied by the United States District Judge on January 20, 1982. No appeal was taken from this order.

In a successive motion you filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, in which you allege lack of effective assistance of counsel, lack of an interpreter and illegal sentence.

Your allegation of ineffective assistance of counsel was raised in your previous 2255 motion. Your allegations of lack of an interpreter and illegal sentence are being raised for the first time in this motion and could have been raised in your prior appeal or 2255 Motion. This successive motion may constitute an abuse of the procedure governed by these rules and may be inexcusable.

III.

This form has been sent so that you may explain why your motion contains the defects noted in (II) above. It is required that you fill out this form and send it back to the Court within 30 days. Failure to do so will result in the automatic dismissal of your motion.

IV.

When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is P.O. Box 1349, Del Rio, Texas 78841.

V.

This response must be legibly handwritten or typewritten, and signed by the movant, under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

VI.

Additional pages are not permitted except with respect to the facts which you rely upon in item 4 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

SIGNED AND ENTERED this 30th day of October, 1984.

DURWOOD EDWARDS
United States Magistrate

## MOVANT'S RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your motion is attacking was entered?

YES XX NO_____

2. If you checked "yes" above, specify as precisely as you can the period of time during which you received assistance, up to and including the present.

1978—A fellow prisoner at the United States Penitentiary in Leavenworth, Kansas.
1979—A fellow prisoner at the United States Penitentiary in Leavenworth, Kansas.
1980—A fellow prisoner at the United States Penitentiary in Leavenworth Kansas.
1980—Ms. Cynthia Woelk, Law Student from the University of Kansas.
1983—A fellow prisoner at the United States Penitentiary in El Reno, Oklahoma.
1984—A fellow prisoner at the United States Penitentiary in Terre Haute, Indiana.

3. Describe the nature of the assistance, including the names of those who rendered it to you.

1978—Prisoner's name unknown. Preparation of 2255 motion.
1979—Prisoner's name unknown. Preparation of 2255 motion.
1980—Sylvester Jones—Prisoner. Preparation of 2255 motion.
1980—Cynthia Woelk—Law Student. Research on case.
1983—Don Sundberg—Prisoner. Preparation of 2255 motion and the subsequent appeal thereof.
1984—Phillip N. Croxton—Prisoner. The current preparation of this response pursuant to the Court order in the case.

4. If your motion is in jeopardy under Rule 9(b) because it asserts the same grounds as a previous motion, explain why you feel it deserves a reconsideration.

If its fault under Rule 9(b) is that it asserts new grounds which should have been included in a prior motion, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions.

The Defendant was arrested on June 11, 1977. Defendant's counsel, Percy Foreman, saw the Defendant two times before trial. Mr. Foreman never asked the Defendant anything about the case. He only asked the Defendant about any monies the Defendant allegedly made from the drug business. Mr. Foreman did not try to investigate the case and, as the record reflects, did not put on any defense for the defendant at all. He rested the defense immediately after the Government rested its case-in-chief. The day before the trial started Mr. Foreman told the Court he was not ready for trial proceedings. The Government has stated that Mr. Foreman is one of the best and most respected criminal attorney's in Texas. However, the Defendant would aver that by a review of the records of the proceedings that Mr. Foreman's performance is well below adequate standards set for effective representation. Mr. Foreman stated that he was not ready for trial of this case and he is supposed to be one of the best attorneys in Texas. Of course Mr. Foreman was right, as the record reflects, he was not ready for trial. The Defendant is not wanting perfect counsel but one which would be a defense counsel in his case. All attorneys have their good days and their bad days and the Defendant feels that Mr. Foreman's representation of this case fell short of constitutional requirements. Mr. Foreman had the names and addresses of where he could have located witnesses requested by the Defendant to testify in his behalf and their testimony was relevant to the Defendant's defense. Mr. Foreman did not call witnesses in support of any defense. Mr. Foreman waited until the last minute and asked the court for a continuance in the proceedings so he could travel to Chicago to interview witnesses. The Court denied this enlargement of time. This would substantiate the Defendant's position that Mr. Foreman did

not investigate the case because the interview of witnesses is the basic rudiments of preparation for defense of a case. Mr. Foreman did not object to certain factual legal questions at trial that he objects to in other similar cases. The issue was brought to the trial court on a failure to provide an interpreter. One shocking fact present is that an attorney of Mr. Foreman's status would only visit the Defendant once before trial with an interpreter and at that meeting ask the Defendant a few questions about monies from the alleged drug trafficing and nothing dealing with the defense of the case. Considering the seriousness of the charges against the Defendant, the Sixth Amendment mandates that an attorney must investigate a case and represent a defendant in a diligent manner. As the record reflects, Mr. Foreman stated that he had trouble communicating with the Defendant. The Defendant did not understand the proceedings against him and still does not. He could not communicate with his counsel before or during trial. The trial court questioned Mr. Foreman on this issue and Mr. Foreman stated he could not produce an interpreter and was tardy on this issue.

The Defendant sincerely feels that there are constitutional questions present in this instant case that would override any abuse of writ under Rule 9(b). The Defendant has tried on previous occasions to bring these specific issues before the Court. The Defendant has been assisted by jailhouse attorneys that has hindered this case because of their lack of knowledge, inexperience and communication problems they had with the issues the Defendant tried to communicate to them. Now due to the problem with not having the money to hire an attorney coupled with the problem with jailhouse lawyers, the case is subject to dismissal under Rule 9(b). The Defendant has not intentionally withheld any ground from this Court. The Defendant feels that, pursuant to current case law and legislative mandates, there are issues of merit present for this Courts consideration and his case should not be dismissed for abuse of the writ pursuant to Rule 9(b). The Defendant further feels the Court would see this merit by a brief review of the allegations and facts contained herein.

Therefore, the Defendant would respectfully request this Honorable Court to grant relief in his favor and such other relief the Court would deem just and proper in its premises.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on this 16th day of November, 1984.

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ELIAZAR VINAGAS-HERRERA, Movant

## CERTIFICATE OF SERVICE

The clerk of the court is hereby ordered to serve a certified copy of this Order and Movant's Response on the Movant by certified mail, return receipt requested.

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DURWOOD EDWARDS
United States Magistrate